

Matthew E. Hedberg, OSB #081958
E-mail: matt.hedberg@bullivant.com
BULLIVANT Houser Bailey PC
300 Pioneer Tower
888 SW Fifth Avenue
Portland, Oregon 97204-2089
Telephone: 503.228.6351
Facsimile: 503.295.0915
Attorneys for Plaintiff Evanston Insurance
Company

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

EVANSTON INSURANCE COMPANY,

Civil No.: _____

Plaintiff,

v.

WAYNE FIELD INCORPORATED, and
MATTHEW MOELLER,

Defendant.

**COMPLAINT FOR DECLARATORY
JUDGMENT**

PARTIES

1. Plaintiff Evanston Insurance as successor by merger to Essex Insurance Company (“Evanston”) is an insurance company organized and existing under the laws of Illinois. Evanston’s principal place of business is Illinois.

2. Defendant Wayne Field Incorporated dba The Heritage Pub (“Wayne Field”) is an Oregon corporation conducting business in Happy Valley, Oregon.

3. Upon information and belief, Defendant Matthew Moeller (“Moeller”) is a resident of Oregon.

JURISDICTION AND VENUE

4. The amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

5. The Court has jurisdiction pursuant to 28 U.S.C. § 1332 (Diversity of Citizenship) and 28 U.S.C. § 2201 (Declaratory Judgment).

6. Venue in the District of Oregon, Portland, Oregon, is proper under 28 U.S.C. § 1391 and Local Rule 3-2. Evanston seeks a declaratory judgment of its obligations, if any, for bodily injury alleged to have been caused by Defendants Heritage Pub and Mr. Moeller.

7. An actual controversy exists between the parties as to whether Evanston has an obligation to defend and indemnify Wayne Field and Mr. Moeller for claims alleged against them in a lawsuit currently pending in Oregon state court.

THE UNDERLYING LAWSUIT

8. On or about February 17, 2017, Michael C. Wykrent filed suit against Wayne Field Incorporated, Heritage Pub LLC, and Matthew Moeller in a case captioned *Michael C. Wykrent v. Wayne Field Incorporated et al.*, Multnomah County Circuit Court Case No. 17CV06764 (“Underlying Lawsuit”). A copy of the Complaint in the Underlying Lawsuit is attached as Exhibit 1.

9. The Underlying Lawsuit generally alleges that Wayne Field and Heritage Pub LLC were engaged in the operation of The Heritage Pub, a restaurant and bar, and that Mr. Wykrent was a customer at The Heritage Pub on January 31, 2016. While Mr. Wykrent was

present at The Heritage Pub, Defendant Moeller (a security guard at The Heritage Pub) allegedly sliced Mr. Wykrent's right hand with a pocket knife. Mr. Wykrent alleges that Moeller was acting in the course and scope of his employment at the time of the injury, and that Defendants Wayne Field and Moeller were negligent in one or more of the following ways: (1) in demonstrating martial arts maneuvers with an open blade; (2) in striking Mr. Wykrent's hand with an open blade; (3) in failing to warn Mr. Wykrent that Mr. Moeller intended to demonstrate martial arts maneuvers with an open blade; (4) in permitting employees to carry knives in the course and scope of employment; and (5) in failing to "protect [Wykrent] from dangerous conditions and remove dangerous conditions" from the premises.

10. The Underlying Lawsuit contains a prayer for damages of \$204,687.02 plus costs and disbursements.

11. Based on the terms, conditions, exclusions, and limitations of the Evanston policy, as well as the allegations in the Underlying Lawsuit, Evanston seeks a determination that it has no duty to defend the Defendants and has no duty to indemnify the Defendants for the Underlying Lawsuit.

THE EVANSTON POLICY

12. Evanston issued a Commercial General Liability Insurance Policy bearing policy number 3DN9398, to Wayne Field with effective dates of August 27, 2015 to August 27, 2016 (the "Policy"). A copy of the Policy is attached to this Complaint as Exhibit 2.

13. Subject to its terms, conditions, exclusions, and limitations, the Policy provides commercial general liability coverage, in relevant part, as follows:

SECTION I – COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a.** We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result.

14. Coverage under the Policy is amended by the Assault or Battery endorsement, which provides:

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART LIQUOR LIABILITY COVERAGE PART

A. Section I – Coverages, Coverage A – Bodily Injury And Property Damage Liability of the Commercial General Liability Coverage Form, and Section I – Liquor Liability Coverage of the Liquor Liability Coverage Form is amended as follows:

1. The Expected Or Intended Injury exclusion is replaced by the following:

Expected Or Intended Injury

"Injury" expected or intended from the standpoint of the insured.

2. The following exclusion is added:

This insurance does not apply to:

Assault Or Battery

“Injury” arising out of “assault or battery”, or any act or omission in connection with the prevention or suppression of “assault or battery”, whether caused by or at the instigation or direction of:

- (1)** Any insured;
- (2)** Any “employee” of the insured;
- (3)** A patron of the insured; or
- (4)** Any other person.

This exclusion applies regardless of any changes or allegations of negligent hiring, training, placement or supervision.

B. The **Definitions section** is amended as follows:

1. The following definition is added to the Commercial General Liability Coverage Form and the Liquor Liability Coverage Form:

“Assault or battery” means:

a. Any attempt or threat to inflict “injury” to another person including any conduct or action that would reasonably place such person in apprehension of such “injury”; and/or

b. The intentional or reckless physical contact with or any use of force against a person without his or her consent that results in “injury” or offensive or abusive touching, whether or not the actual “injury” inflicted was intended or expected. The use of force includes but is not limited to the use of a weapon.

“Assault or battery” includes “injury” resulting from the use of reasonable force to protect persons or property.

2. The following definition is added to the

Commercial General Liability Coverage Form:

"Injury" means damages because of "bodily injury" and "property damage", including damages for care, loss of services or loss of support.

15. The Policy provides, "The word 'insured' means any person or organization qualifying as such under Section II – Who Is An Insured."

16. The Policy provides that an "insured" includes:

- a. Your "volunteer workers" only while performing duties related to the conduct of your business or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business.

CLAIM FOR DECLARATORY RELIEF

17. Based on the terms, conditions, limitations, and exclusions of the Policy and the allegations of the Complaint in the Underlying Lawsuit, Evanston has no duty to defend or indemnify Wayne Field or Matthew Moeller in connection with the claims made in the Underlying Lawsuit.

PRAYER FOR RELIEF

WHEREFORE, Evanston Insurance Company prays for judgment in its favor as follows:

Bullivant|Houser|Bailey PC

300 Pioneer Tower
888 SW Fifth Avenue
Portland, Oregon 97204-2089
Telephone: 503.228.6351

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1. For a declaration that Evanston has no duty to defend or indemnify Wayne Field or Mathew Moeller for any liability either may incur in the underlying lawsuit;
2. For Evanston's costs and disbursements incurred in this lawsuit; and
3. For any other relief the Court deems just and proper.

DATED: August 1, 2017

BULLIVANT HOUSER BAILEY PC

By /s/ *Matthew E. Hedberg*
Matthew E. Hedberg, OSB #081958
Telephone: 503.228.6351
Attorneys for Plaintiff Evanston Insurance
Company

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